Filed 8/30/06 Michael D. v. Sup. Ct. CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MICHAEL D. Petitioner, v. THE SUPERIOR COURT OF KERN COUNTY, Respondent, KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Real Party In Interest.	F050533 (Super. Ct. Nos. JD091738-00, JD091739-00) **O P I N I O N**

THE COURT[*]

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. Robert Anspach, Judge.

Kenneth Mason, for Petitioner.

No appearance for Respondent.

B.C. Barmann, Sr., County Counsel, and Jennifer E. Zahry, Deputy County Counsel, for Real Party In Interest.

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[*]Before Vartabedian, Acting P.J., Harris, J., and Cornell, J.

Petitioner seeks an extraordinary writ (Cal. Rules of Court, rule 38-38.1) to vacate the orders of the juvenile court removing his children, Michael and Monica, and setting a Welfare and Institutions Code[1] section 366.26 hearing to implement a permanent plan of adoption. We will deny the petition.

STATEMENT OF THE CASE AND FACTS

Dependency proceedings in this case were initiated in July 2000 when the Kern County Department of Human Services (department) took then three-year-old Matthew and one-year-old Monica into protective custody after their parents, petitioner and M.D.,[2] were arrested for manufacturing methamphetamine in their home. Petitioner and M.D. have a history of alcohol and drug abuse and M.D. suffers from bipolar disorder. The juvenile court assumed dependency jurisdiction, the children were placed in foster care and the parents were provided 18 months of reunification services after which the children were returned to their custody under family maintenance in January 2002.

In March 2002, the children were removed on a section 387 supplemental petition (supplemental petition) after M.D. allegedly bit Matthew for biting his sister. In June 2002, at the dispositional hearing on the supplemental petition, the court terminated reunification services and set the matter for a section 366.26 hearing.[3] In January 2003, the court conducted the section 366.26 hearing and ordered the children into long-term foster care with weekly unsupervised visitation.

The children remained in foster care until October 2005 when the court returned them to petitioner and M.D.'s custody under family maintenance, which required them to provide the children a safe, adequate and appropriate home environment in keeping with

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1 All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

2 M.D. also seeks extraordinary writ relief from the instant proceedings (F050510).

3 We denied M.D.'s writ petition from the court's setting order (F040911).

community standards. A Court Appointed Special Advocate (CASA) was appointed to monitor the children's well-being.

Over the years following the children's initial removal, petitioner's physical and emotional health declined and he was not able to do much more than dress and feed himself. M.D. was the primary caretaker for them both but she also suffered severe emotional and physical limitations. Chronic depression caused her to sleep during the day sometimes up to six hours in the afternoon. She also has chronic obstructive pulmonary disease. To make matters worse, both children were diagnosed and medicated for Attention Deficit Hyperactivity Disorder.

Initially, M.D. was able to manage the household and care for the children but that changed rather quickly. On January 6, 2006, during an unannounced visit to the home, the social worker found the children unkempt and broken glass and plastic in the front yard. She also observed dishes in the sink and clutter and food crumbs on the children's bedroom floors and smelled urine in the bathroom. The social worker told the parents their home needed to be cleaned and that she would return. When the social worker returned three days later, the home was clean.

In mid-January, petitioner was admitted to the hospital for eight days. On February 3, just a little over a week after he returned home, M.D. was bitten on the stomach by a brown recluse spider and developed an infection. She was admitted to the hospital for two weeks where her abscess was drained and she was administered intravenous antibiotics. While hospitalized, M.D. left the children in petitioner's care and arranged for a church member to take them to school and for her sister to help petitioner with the cleaning and cooking. M.D.'s sister helped petitioner the first week but didn't return the second week. M.D. also instructed petitioner and her ex-brother-in-law in how to administer the children's medication.

On February 15, the social worker visited the home and noted dirty dishes on the kitchen table, a cereal bowl with congealed milk, clothing and trash on the floors, dirty

pull-ups and used sanitary napkins on the floor in the children's bedroom and the smell of urine in the children's room. Petitioner acknowledged that the house was "trashed" but explained that M.D. was in the hospital and that he did not have anyone to help him. The social worker stated that she would make a referral for in-home services. Petitioner asked how much time he had to clean the house and the social worker told him he had until Monday, February 20.

On February 16, at approximately 6:45 p.m., M.D. arrived home from the hospital. The next morning, the social worker interviewed Monica and Matthew at their school and then returned to the home to check on the progress of the house-cleaning. She found the condition of the home unchanged. The social worker asked petitioner what medications the children took and in what dosages. He said he did not know and called M.D. out of the bedroom. She told the social worker the children take the same medication, which she identified and the dosage each child takes, indicating that Matthew's dose is twice that of Monica's.

The social worker left the residence and took the children into protective custody at their school. While at the school, she spoke to the principal who stated the children were doing well academically but there were concerns about their hygiene. That night, with the assistance of a neighbor and members of her church, M.D. cleaned the home. The children were placed with their paternal aunt in another county.

On February 23, 2006, the juvenile court ordered then eight-year-old Matthew and seven-year-old Monica detained pursuant to a supplemental petition filed by the department alleging family maintenance had proven ineffective because, on January 6, February 15, and February 17, 2006, the family home was filthy. M.D. testified at the jurisdictional hearing on the supplemental petition on April 27, 2006, and admitted their home was in the state as alleged on those dates. However, she testified she was able to keep her home clean with the help of ladies from her church. At the conclusion of

M.D.'s testimony, her attorney made an unchallenged offer of proof that the social worker would testify the home was clean the day before the hearing.

The CASA testified petitioner and M.D.'s poor health prevented them from maintaining the home and caring for the family. She observed the children to have dirty hair, fingernails and clothes. She was concerned that the unsanitary conditions of the home and the children's poor hygiene could make them sick and cause them to miss school. However, she was most alarmed by the fact that Matthew gave his medication to Monica while M.D. was in the hospital because Monica ran out of her medication.

After testimony, counsel for M.D. argued the court should dismiss the petition because the home was clean and the children were no longer at risk. Counsel for petitioner joined in her argument. The court disagreed and stated it had to determine whether the circumstances placing the children at risk existed on the dates alleged. Consequently, the court found the allegations true and family maintenance ineffective in protecting the children. The court continued the matter for disposition and asked the department to inquire as to what in-home services might be available for the family.

In a supplemental report, the department advised the court neither petitioner nor M.D. were eligible for in-home services but that M.D. had been given a three-page list of home cleaning and home care services. Of the services listed, only one was affordable for the family. The department also reported the bishop of petitioner's church was willing to assist the family on an as-needed basis but that the church promoted self-sufficiency. Along with its report, the department filed an affidavit from petitioner's neighbor stating she would provide assistance with cleaning and cooking meals for two to four hours a week for up to six months.

The CASA also filed a supplemental report in which she stated Matthew and Monica were doing exceptionally well with their paternal aunt and her 12 and 3-year-old daughters. Monica shared a room with her cousins and Matthew had his own bedroom. They enjoyed their new school and were doing well scholastically. Monica had stopped

wetting her bed and no longer needed pull-ups and proudly showed the CASA her new haircut. The CASA expressed concern that petitioner and M.D. would not be able to adequately care for the children even with the assistance of their neighbor and church members and recommended the court retain the children in the care of their aunt.

On May 31, 2006, the court conducted a contested dispositional hearing on the supplemental petition. M.D. testified she contacted four agencies for services and was on their waiting lists but admitted that, after paying her neighbor for her services, she could not afford any additional services. However, she also testified she could maintain her home with the help of her neighbor and the children for whom she devised a list of chores and a reward system. In addition, there were five families from her church who were willing to help her with transportation, food preparation and maintaining the home. On cross-examination, she admitted she was only able to get her housework completed in stages with short rest periods and, though petitioner was able to dress and feed himself, his condition had gotten progressively worse since January 2006. Petitioner did not testify.

Following testimony, county counsel and minors' counsel focused on the risk of having to remove the children again if petitioner and M.D. proved unable, even with support, to take care of the children. Counsel for M.D. requested family maintenance services, arguing the back-to-back hospitalizations were an isolated event and that petitioner and M.D. were not previously aware of the services available to them. Counsel for petitioner argued that petitioner was attempting to improve his health and he and M.D. could care for the children with the help of the department and the CASA.

At the conclusion of the hearing, the court noted the children had been in their parents' custody for approximately seven months over the prior six years. The court also acknowledged petitioner and M.D.'s love for their children but stated the parents' emotional and physical limitations still prevented them from properly caring for the children on an ongoing basis. Accordingly, the court found clear and convincing

evidence the children would be at a substantial risk of danger if returned to parental custody and that the department made reasonable efforts to prevent the children's removal. The court ordered the children removed, terminated reunification services and set a section 366.26 hearing for September 28, 2006, to consider a permanent plan of adoption in the home of the paternal aunt. This petition ensued.

DISCUSSION

Petitioner claims the juvenile court erred in finding the children at risk based on the fact that the allegations of the supplemental petition put the children at risk on the day the petition was filed. Since the home was clean at the time of the jurisdictional hearing on the supplemental petition, he claims, the court erred in finding the allegations true. To support his proposition, he quotes *In re Rocco M.* (1991) 1 Cal.App.4th 814 (*Rocco M.*): "While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm. [Citations.]" (*Id*. at p. 824; original italics, fn. omitted.) However, *Rocco M*. is unavailing because it concerned the juvenile court's assumption of jurisdiction under section 300 on an original petition. (*Id*. at pp. 820-826.) On a supplemental petition, as in this case, the juvenile court *already has jurisdiction*. Moreover, under the legal authority governing proceedings on a supplemental petition, the instant juvenile court did not err as we will explain.

A supplemental petition is the means by which the department seeks to obtain an order removing a child from parental custody on a showing that the previous disposition was ineffective.[4] The supplemental petition must contain a concise statement of facts

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[4] Section 387 provides in relevant part:

"(a) An order changing or modifying a previous order by removing a child from the physical custody of a parent, … and directing placement in a foster home … shall be made only after noticed hearing upon a supplemental petition.

sufficient to support the conclusion that the previous disposition has not been effective in protecting the child. (§ 387, subd. (b).)

A bifurcated hearing is required on a supplemental petition. (*In re Jonique W.* (1994) 26 Cal.App.4th 685, 691 (*Jonique W.*); Cal. Rules of Court, rule 1431(e).) The first or "jurisdictional" phase is a "factfinding proceeding" to determine whether the factual allegations of the supplemental petition are or are not true and whether the allegation that the previous disposition was not effective in protecting the child is, or is not, true. (*Jonique W.*, *supra*, 26 Cal.App.4th at p. 691.) "The department must prove the jurisdictional facts by a preponderance of legally admissible evidence." (*Ibid.*)

If the court finds the previous disposition was not effective in protecting the child, the court is required to conduct the second phase of the bifurcated hearing. (Cal. Rules of Court, rule 1431(e)(2).) This second phase is a dispositional hearing at which the court determines whether removal is warranted. (*Ibid.*) The same standard applicable to the initial removal of a child from the physical custody of his or her parents pursuant to section 361 also applies to removal under section 387: the court must find there is clear and convincing evidence of a substantial danger to the physical health of the child and that there are no reasonable means by which the child's physical health can be protected without removing the child from his or her parents' physical custody. (*In re Paul E.* (1995) 39 Cal.App.4th 996, 1000-1001.)

Since petitioner only challenges the court's true findings on the supplemental petition, we will not address the court's order removing the children from his custody. On a challenge to the court's true finding on the section 387 petition, we determine

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"(b) The supplemental petition shall be filed by the social worker in the original matter and shall contain a concise statement of facts sufficient to support the conclusion that the previous disposition has not been effective in the rehabilitation or protection of the child …"

whether substantial evidence supports the juvenile court's finding. (*Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1078.) In this case, we conclude that it does.

The supplemental petition alleged as to both children that "[o]n January 6, 2006, February 15, 2006, and February 17, 2006, the home was found to be filthy[, debris] was scattered about the house, including soiled diapers and feminine napkins lying on the floor in the children's bedroom[, and food] was rotting in the kitchen and the house smelled strongly of urine and rotten food." M.D. admitted the truth of these allegations at the jurisdictional phase of the hearing on the supplemental petition. Therefore, at least with respect to the truth of the allegations, the evidence supports the court's true findings.

We also conclude the evidence supports the court's finding that family maintenance was not effective in protecting the children. Within only three months of the children's return, the family cycle repeated itself. As early as January 2006, petitioner and M.D., chronically physically and emotionally debilitated, demonstrated their inability to meet their children's basic needs. The children were living in clutter and filth and suffering poor hygiene. In addition, they were administering their own medication, a very dangerous situation that fortunately did not result in any serious harm. It is clear from the record that petitioner alone can not care for the children and it is dubious whether together he and M.D. can care for them even under the best of circumstances. Consequently, we find no error in the court's application of the law with respect to adjudicating the section 387 petition, nor with respect to its true findings on the petition.

DISPOSITION

The petition for extraordinary writ is denied. This opinion is final forthwith as to this court.